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THE DOCTRINE OF POLITICAL QUESTIONS IN THE FEDERAL COURTS

By Oliver P. Field*

This study will not be concerned with the effect of party platforms upon judicial decisions. The term "political question" as used in the following pages will refer to its more technical meaning in the field of constitutional law. It is elementary that the courts will not decide political questions. The reason usually given for this attitude of the courts is that the decision of the question has been placed with the executive or legislative branches of the government. These departments are often called the political departments when contrasted with the judicial department. When the court is confronted with a case involving a political question it will look to the political branches of the government to learn what the view is which those departments have expressed. When that view is ascertained, the courts will act in conformity with it. The result is that the case is not decided upon its merits as an independent question by the court. The expressed view of the political department becomes a rule of decision for the court.

There is a distinction to be drawn between the doctrine of political questions and the doctrine which underlies those cases which concern the difference between ministerial and discretionary acts. For that reason the cases dealing with ministerial and discretionary duties of public officers will be omitted in this study, though they are often included in the general discussions of political questions. In the following sections an attempt is made to classify the cases which the federal courts have held to involve political questions. The classification is made on the basis of the subject matter involved in the cases. In conclusion, such generalizations as seem warranted by the cases will be formulated. Such utility as the study may have will consist, however, in the classification of the cases, because conclusions

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1 See Willoughby, Constitutional Law, chap. 51. It is believed that the doctrine of political questions as applied in the state courts has been influenced by additional factors to those which enter into the cases in the federal courts. For that reason the state cases have not been treated in this paper.
and explanations are often colored to some extent by the viewpoint of the student.

1. **NEGOTIATIONS, VIOLATION, AND TERMINATION OF TREATIES**

The federal courts will not inquire into the constitutional powers of the representatives of foreign nations with whom the United States negotiates treaties.² In *Doe v. Braden* objection was made that the King of Spain did not have the constitutional power under Spanish law to annul certain grants of land made by him to Spaniards within the territory of Florida at the time negotiations for the purchase of the territory were under way between the United States and Spain. The court refused to consider this objection, holding that it was for the president and the senate of the United States to determine whether the powers of the King were satisfactory in this instance. The court felt that it was concluded on the question in view of the fact that those departments were satisfied with the King's powers. The fact that the political departments might have been mistaken was said not to alter the case. Chief Justice Taney stated the reason for the decision in the following quotation:

"It would be impossible for the executive department of the government to conduct our foreign relations with any advantage to the country, and fulfill the duties which the constitution has imposed upon it, if every court in the country was authorized to inquire and decide whether the person who ratified the treaty on behalf of a foreign nation had the power, by its constitution and laws, to make the engagement into which he entered."

This doctrine is also applicable to treaties concluded with the Indian tribes.³ In one case it was held that the courts could not go behind the treaty to see whether the head men acting in behalf of a tribe actually represented all the divisions of the tribe.⁴

Whether a treaty has been broken by one of the parties to it has been held to be a matter which the courts will not determine. Justice Iredell said in *Ware v. Hylton*,⁵ "These are considerations of policy, considerations of extreme magnitude, and certainly entirely incompetent to the examination and decision of a court of justice." One of the leading cases involving this

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²(1853) 16 How. (U.S.) 635, 14 L. Ed. 1090.
⁴In re Race Horse, (1895) 70 Fed. 598, 607; Ansley v. Ainsworth, (1902) 4 Ind. T. 308, 69 S.W. 884 (refusing to countenance the argument that the Atoka agreement was procured under duress).
⁵(1796) 3 Dall. (U.S.) 199, 260, 1 L. Ed. 568.
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point is that of Taylor v. Morton,6 wherein it was alleged that the United States was discriminating against Russian hemp contrary to a treaty with Russia. Justice Curtis said in his opinion in that case:

"Is it a judicial question whether a treaty with a foreign sovereignty has been violated by him . . . ? I apprehend not. These powers have not been confided by the people to the judiciary, which has no suitable means to exercise them; but to the executive and the legislative departments of our government. They belong to diplomacy and legislation, not to the administration of existing laws."

This view has been expressed in other cases.7 It was alleged that the first Chinese exclusion legislation constituted a breach of the Burlingame treaty of 1868.8 The court answered that if there had been a breach of that treaty by the United States the courts were not the proper place in which to make complaint.9 Whether China had just cause for complaint was said to be a matter to be taken up with the political departments. The courts were said to have no other choice than to regard the case as any ordinary conflict of a congressional statute with a treaty. Justice Miller said in the Head Money Case,10 that if the honor and interests of a nation did not suffice to secure the enforcement and observance of a treaty, resort must be had to other means. The infraction of a treaty was said to be a subject for international negotiation, or even war. To quote from his opinion: "It is obvious that with all this the judicial courts have nothing to do and can give no redress."

The protection of Mexican property rights in land located within the territory ceded by Mexico to the United States by the treaty of Guadeloupe Hidalgo was held to be exclusively a congressional function.11 The court refused to enforce the provisions of the treaty when the government of the United

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States chooses to disregard them. Although the court conceded that the rights in question were perfect at international law, it was nevertheless said that:

"The duty of protecting imperfect rights of property under treaties such as those by which territory was ceded by Mexico to the United States . . . rests upon the political and not the judicial department." 12

Closely related to the subject of the violation of treaties is that of the termination of treaties. The courts have held that they will follow the decision of the political branches of the government in determining whether a treaty has been terminated. In these cases it is the executive department to which the court looks for guidance. In *Ware v. Hylton* Justice Iredell expressed the opinion that the treaty between England and the United States must be regarded as still existing by the courts unless it were shown that the other branches of the government looked upon it as terminated. 13 It is interesting to note that Justice Iredell based his opinion upon the law of nations rather than upon constitutional grounds. Incidentally he also expressed the opinion that only Congress could terminate a treaty. 14

A number of cases have arisen in which the question was presented to the court of the effect upon a treaty of the incorporation of a nation with whom the United States had concluded a treaty into an empire or larger nation. The courts have looked to the executive department for their cue in these cases. In accordance with this doctrine a consular convention with Algiers was held to be terminated by the incorporation of that country into the dominions of the French Republic. 15 With the formation of the German Empire questions were raised as to the binding effect of extradition treaties previously concluded with Bavaria 16 and Prussia. 17 In each of these cases the

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12 United States v. Santa Fe, (1896) 165 U.S. 675, 41 L. Ed. 874, 17 S.C.R. 472. See also United States v. Sandoval, (1897) 167 U.S. 278, 42 L. Ed. 168, 17 S.C.R. 868, wherein it was said: "The mode in which private rights of property may be secured, and the obligations imposed upon the United States by treaties fulfilled, belongs to the political department of the government to provide."

13 (1796) 3 Dall. (U.S.) 199, 261, 1 L. Ed. 568.

14 See Wright, Control of American Foreign Relations 107. "The only constitutional authorities for terminating treaties are Congress by an act signed by the president or passed over his veto, the treaty-making power and possibly the president alone." This author speaks of the power to terminate treaties as a legislative power.


executive regarded the treaties as existing and the courts adhered to the views expressed by that department. The famous Charlton Case involved a breach of an extradition treaty by Italy. In spite of the fact that Italy had breached the treaty the Supreme Court held that the treaty must be applied in so far as it affected the duties of the United States. The reason given for this decision by the court was that the executive department had pronounced the treaty a binding obligation upon the United States. The person to be extradited in this case was an American citizen.

It thus appears the existence or non-existence of a treaty as a binding obligation upon the United States is a political question. The court has, however, decided whether a given treaty has been suspended by a state of war. But the cases in which this has been done have been those in which there had been no action by the political departments of the government on the subject. Should the political departments have taken any affirmative action in the matter there can be no doubt that the courts would abide by their action.

There is only one method by which the courts could terminate treaties. That would be by declaring a treaty unconstitutional, which apparently has never been done. There are some dicta to the effect that if there was a clear conflict between the treaty and the constitution, the courts would be constrained to declare the treaty null and void. This is of course a logical result of the doctrine of constitutional limitations which is so firmly embedded in our system of government, but the opportunities to distinguish and explain and interpret are so varied that the courts will per-

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18 Charlton v. Kelly, (1913) 229 U.S. 447, 57 L. Ed. 1274, 33 S.C.R. 945, affirming 185 Fed. 880. Justice Lurton said, "... on the question whether this treaty has ever been terminated, governmental action in respect to it is of controlling importance." See also Castro De Uriarte, (1883) 16 Fed. 93.


20 Wright, op. cit., p. 256.

21 In re Dillon, (1854) 7 Savy. (U.S.C.C.) 561, Fed. Cas. No. 3914 does not decide that the treaty involved in that case was unconstitutional. See note, Mathews, Conduct of American Foreign Relations 191. The case of Thomas v. Gay, (1898) 169 U.S. 264, 42 L. Ed. 740, 18 S.C.R. 340, is cited to support the following statement, "The Supreme Court has decided that a treaty cannot alter the constitution," by Noel Sargent in an article entitled "Bills for Raising Revenue under the Federal and State Constitutions," 4 MINNESOTA LAW REVIEW 330, 343, note 43. This is clearly error, for the case decided did not involve the question, nor was it decided upon that ground, and the portion quoted in the opinion from the decision in Foster v. Neilson, (1829) 2 Pet. (U.S.) 253, 7 L. Ed. 415, is itself dictum.
haps be loath to see a "clear conflict." Doubtless most courts would agree with Justice Chase when he said:22

"If the court possess a power to declare treaties void, I shall never exercise it, but in a very clear case indeed."

2. BEGINNING AND ENDING OF WAR

The date at which a war begins is a political question. When a formal declaration of war accompanies the outbreak of war there should be little difficulty. But in the case of the Civil War no formal declaration of war was issued, and the question became quite important. The Civil War did not begin in all of the states at the same time. The courts accepted the dates fixed by the political departments in those cases which involved the date of the beginning of the war.23 There is no reason to doubt that the courts would adopt the same attitude towards the question of the date of the beginning of a foreign war. It would logically follow from the principle just stated that the courts would also look to the political branches of the government to ascertain whether a state of war exists. It was said in one case that:24

"The condition of peace or war, public or civil, in a legal sense, must be determined by the political department, not the judicial. The latter is bound by the decision thus made."

The date of the termination of a war is also to be fixed by the political departments. In the case of the Civil War there was the same difficulty in fixing the date of its termination that existed in setting the date of its beginning. The court resorted to executive and congressional acts for evidence on the question of when the war terminated.25

22 Ware v. Hylton, (1796) 3 Dall. (U.S.) 199, 237, 1 L. Ed. 568.
23 The Protector, (1871) 12 Wall. (U.S.) 700, 20 L. Ed. 463. In this case it was suggested that the proclamation of April 19, 1861, be taken to mark the beginning of the war in South Carolina, Georgia, Alabama, Florida, Mississippi, Texas, and Louisiana. For Virginia and North Carolina the proclamation of April 17 was accepted. See also Hamilton v. Dillin, (1874) 21 Wall. (U.S.) 73, 22 L. Ed. 528.
A somewhat unusual situation existed in the termination of the World War, so far as the United States was concerned. Hostilities ended with the signing of the Armistice on November 11, 1918. But the United States did not ratify the treaty of peace at the time when many of the other belligerent nations did so. It had been intimated in some cases that the proper method of ending a foreign war was by a treaty of peace.²⁶ No treaty of peace was signed by the United States during the three years following the signing of the Armistice. During this period the courts were besieged with cases which turned on the question of when the war ended.²⁷ One of the inferior federal courts apparently succumbed to the pressure and grasped at a statement made by the president in a speech to congress to the effect that with the cessation of hostilities “the war thus comes to an end.” This was held to be evidence that the executive regarded the war as terminated.²⁸ But the Supreme Court held that the war did not come to an end with the signing of the Armistice,²⁹ and several other inferior courts held likewise in cases coming before them. It was finally decided that the joint resolution of July 2, 1921, marked the end of the war in a legal sense,³⁰ and it was thus made manifest that there are other ways of terminating a war so far as the domestic courts are concerned than that of the ratification of a treaty of peace.


²⁶United States v. Anderson, (1869) 9 Wall. (U.S.) 56, 19 L. Ed. 615, where it was said, “In a foreign war, a treaty of peace would be the evidence of the time when it closed.” Also Hijo v. United States, (1904) 194 U.S. 315, 48 L. Ed. 994, 24 S.C.R. 727.


3. Admission and Deportation of Aliens

The power of a nation to control the admission of aliens has been said to be a power which inheres in sovereignty. The right to determine what persons a nation wishes to admit and what persons it wishes to exclude finds its source in the law of nations. The courts have held that the national government in the United States has this power. In the Chinese Exclusion Case the court said:

"The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one."

The power to expel aliens is said to rest on the same ground as the power to exclude, and Congress may expel such aliens as seem to it to be undesirable. It is Congress that has the power to control the admission and exclusion of aliens. This is not an express power of Congress, but one implied from several expressed powers. More often, however, the court has deduced the power from the theory of inherent sovereignty residing in the national government for purposes of international relations.

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312 C.J. 1075, sec. 46; Borchard, Diplomatic Protection of Citizens Abroad 45; 1 Hyde, International Law Chiefly as Applied by the United States 94, "A state is acknowledged to enjoy the broadest right to regulate the admission of aliens to its territory."

32"According to the accepted maxims of international law, every sovereign nation has the power, as inherent in sovereignty and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such manner and upon such conditions as it may see fit to prescribe." 2 C.J. 1075.


36 Zakonite v. Wolf, (1912) 226 U.S. 272, 57 L. Ed. 218, 33 S.C.R. 31; Ex parte Li Dick, (1910) 176 Fed. 998, 999; Bugajewitz v. Adams, (1913) 228 U.S. 585, 57 L. Ed. 978, 33 S.C.R. 607, where Justice Holmes said: "It is thoroughly established that Congress has power to order the deportation of aliens whose presence in the country it deems hurtful." See also Japanese Immigrant Case, (1903) 189 U.S. 86, 47 L. Ed. 721, 23 S.C.R. 611.

37 This type of power is sometimes denominated a resulting power, as distinguished from the usual implied power where the implication rests on a single express power. See Willoughby, op. cit., secs. 37, 38; 2 Story, Commentaries on the Constitution, 5th Ed., sec. 1256.

38 Fong Yue Ting v. United States, (1892) 149 U.S. 698, 37 L. Ed. 905, 13 S.C.R. 1016; Rodgers v. United States, (1908) 157 Fed. 381. The power over foreign commerce has sometimes been invoked. See United
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It was said in the Chinese Exclusion Case that the determination of the government on the question of the admission of aliens was "necessarily conclusive upon all its departments and officers." The term government as here used doubtless refers to Congress. Explicit statements are to be found in several subsequent cases to the effect that the admission and expulsion of aliens rests with the political departments. Justice Gray stated in Ekiu v. United States:39

"It belongs to the political department of the government . . . It is not within the province of the judiciary to order that foreigners who have never been naturalized, nor acquired any domicil or residence within the United States, nor even been admitted into the country pursuant to law, shall be permitted to enter it, in opposition to the constitutional and lawful measures of the legislative and executive branches of the national government."

It was observed in the Japanese Immigrant Case:40 "Now, it has long been settled that the power to exclude or expel aliens belonged to the political department of the government." To quote a still more positive statement from Rodgers v. United States:41

"This absolute and plenary power is recognized by international law, as essential to national well being and self preservation. The power is political in its nature, and its exercise is not subject to judicial challenge or criticism."

The courts will not decide on the wisdom of any particular policy adopted by Congress in the control of aliens.

But it is not to be understood that Congress is therefore free to break down the protection of constitutional guaranties to the individual in carrying out its policies with regard to aliens. It is true that a deportation proceeding is not a criminal proceeding, and therefore does not require a jury trial.42 The courts go far in upholding the determinations of administrative officers,43


40(1903) 189 U.S. 85, 100, 47 L. Ed. 721, 23 S.C.R. 611.
41(1908) 157 Fed. 381, 383.

but even aliens are entitled to such protection as is afforded in administrative proceedings by the due process clause. Evidence gained in contravention of the searches and seizures clause of the federal constitution will not be admitted in a deportation proceeding. Neither may Congress provide for punishing entrance into the United States contrary to statute as an infamous crime, without allowing a jury trial to determine the guilt of the accused. It is also settled that a person who is a citizen of the United States may not be deported as an alien, though he be a descendant of a father who could not become a naturalized citizen under the naturalization laws. Here we find the fourteenth amendment a stumbling block to the national government instead of to the states. In Keller v. United States it was decided that Congress could not control the relations of citizens with aliens for a period of three years after the admission of the alien into the country. Such congressional regulation was held to invade the police power of the states too far. It is perhaps this view that Congress may not transgress the constitution in the exercise of the power to control the admission and deportation of aliens that prompted the court to suggest in some of its statements a caution that the courts could intervene if required to do so by the constitution. The methods used in deportation are subject to judicial review.

4. Jurisdiction Over Territory

In a consideration of the cases dealing with the assertion of jurisdiction over territory a distinction must be drawn between those cases which involve an assertion of jurisdiction over a territory by the government of the United States against another

44Burdick, op. cit., p. 514.
45United States v. Wong Quong Wong, (1899) 94 Fed. 832.
46Wong Wing v. United States, (1896) 163 U.S. 228, 41 L. Ed. 140, 16 S.C.R. 977. Justice Shiras said: "But when Congress sees fit to further promote such a policy by subjecting the persons of such aliens to infamous punishment at hard labor, or by confiscating their property, we think such legislation, to be valid, must provide for a judicial trial to establish the guilt of the accused." 163 U.S. 237.
49Some of the statements made by Justice Gray in United States v. Rodgers, (1911) 191 Fed. 970, and Rodgers v. United States, (1907) 157 Fed. 381, seem to go pretty far in the direction of judicial abstention from interference in matters touching deportation, going even to the length that individual rights as guaranteed by the constitution should not stand in the way of congressional policy with regard to the control of immigration.
nation, and those cases which involve conflicting claims to territory between foreign nations. One is really a question of recognition, but because the subject matter of both is the same the two will be treated together.

Whenever the political departments of the government assert title to or jurisdiction over territory the courts must acquiesce in that assertion. This was settled in *Foster v. Neilson* where a boundary dispute between the United States and France was pressed upon the court for solution. The United States had contended that Louisiana Territory extended as far eastward as the Perdido river. France contended that the river Iberville was the eastern boundary of Louisiana. While there was ground for a difference of opinion, it was nevertheless decided that the court could not enter into the merits of the controversy thus raised in a land grant case. Chief Justice Marshall asserted that it was not the function of the judiciary to press the interests of the United States against a foreign power. The court felt itself bound to follow the expressed view of Congress in the location of the boundary line in question. The basis for this attitude is set forth in the following portion of the opinion:

"After these acts of sovereign power over the territory in dispute, asserting the American construction of the treaty by which the government claims it, to maintain the opposite construction in its own courts would certainly be an anomaly in the history and practice of nations. If those departments which are entrusted with the foreign intercourse of the nations, which assert and maintain its interests against foreign powers, have unequivocally asserted its rights of dominion over a country of which it is in possession, and which it claims under a treaty; if the legislature has acted on the construction thus asserted; it is not in its own courts that this construction is to be denied. A question like this respecting the boundaries of nations, is, as has been truly said, more a political than a legal question; and in its discussion the courts of every country must respect the pronounced will of the legislature."

This is all that the case is authority for, in view of later decisions of the court upon the other points involved.

This principle of *Foster v. Neilson* is applicable to the case of a disputed boundary between Indian lands and other territory. Whether San Juan island belonged to the United

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50(1829) 2 Pet. (U.S.) 253, 7 L. Ed. 415.
51(1829) 2 Pet. (U.S.) 253, 309, 7 L. Ed. 415.
States or to Great Britain was held to be a political question in a territorial court. Speaking of the disputed boundaries of a judicial district which was alleged to include the island in question, the court said:

"Those bounds are identical, in the eye of the courts of the United States with the boundary lines along the canal de Haro, claimed by the political department of the general government to be the true political boundary."

It was argued in *Wilson v. Shaw* that the executive branch had exceeded its powers in the acquisition of the territory from Panama through which the canal was to be built. Congress had established a government for the territory and in various other ways given evidence that they ratified the action of the executive. The court ruled that they were bound by this action, saying, "Their concurrent action is conclusive upon the courts. We have no supervisory control over the political branch of the government in its action within the limits of the constitution."

One might speculate whether it would have made any difference what sort of evidence had been adduced to show that the executive had used reprehensible methods in the acquisition of the territory in question.

In *Jones v. United States* the jurisdiction of the United States over an island, alleged to have been acquired by virtue of the act of 1856 was challenged. The court said:

"Who is the sovereign, de jure or de facto, of a territory is not a judicial but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens, and subjects of that government."

The date at which a territory comes under the jurisdiction of the United States is a political question. Not only the extent of the territory acquired, but the time of the acquisition of the same is for the executive or the legislature to determine.

The states also follow the rule of *Foster v. Neilson* and *Jones v. United States* with regard to the assertion of territorial jurisdiction by the legislative and executive branches of the state government. State courts have held that they will not examine into the question of the territorial extent of the state. When

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58 See also United States v. Yorba, (1863) 1 Wall. (U.S.) 412, 17 L. Ed. 635.
there is a dispute between a state and another state or territory, the courts will follow the lead of the political departments of their own state. Of course if the dispute were between two states and the question had been settled by the Supreme Court of the United States in the exercise of their original jurisdiction over such cases, the state courts would doubtless have to apply the rule of the federal supreme court. It has been stated in some opinions that whether a given locality is within the boundaries of a military reservation is a political question. The decision of the executive in the location of such boundaries has been held to settle the matter for the courts. It has also been suggested in a number of cases that the making of surveys of government lands is a political function with which the courts may not interfere. In one case a decree of a trial court was corrected because it established a private survey in fixing the true boundaries of a parcel of land, the court observing that “The making and correction of surveys of public lands belongs to the political department of the government.”

Not only does the rule noted in the foregoing cases apply to the assertion of jurisdiction over land, but it also applies to the sea. Nations sometimes assert a jurisdiction over the sea extending far beyond the three mile limit which has up to the present time generally been considered the usual extent of national jurisdiction. The United States has been guilty of just this sort of thing, and the courts have in several cases been forced to abide by the assertion of such jurisdiction by Congress. Captures made outside the ten mile limit for violation of revenue laws have been sustained because the courts felt bound by the action of the political department, that department at the

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60 Harrold v. Arrington, (1885) 64 Tex. 233. In State v. Bowman, (1909) 89 Ark. 428, 116 S.W. 896, the state legislature had accepted a strip of land granted to the state by Congress, and the jurisdiction of the state courts in cases arising in this locality being challenged the court said: “The grant of the strip in question by Congress, its acceptance by our legislature, and the subsequent exercise of authority by the state makes the question a political one, and the courts of the state must treat that as conclusive of the question of boundary.”


64 In re Cooper, (1892) 143 U. S. 472, 36 L. Ed. 232, 12 S.C.R. 453, wherein the United States asserted jurisdiction over practically the whole of Behring Sea.
time being engaged in a controversy with another nation as to the true extent of such maritime jurisdiction. When the question had been settled by arbitration, however, the courts held that the decision of the arbitrators was binding on the courts of the United States, the award having been acceded to by the government. If the government had not recognized the validity of the arbitration award the courts doubtless would have taken a different course.

The courts will not determine which of two contending nations is entitled to a territory. If the executive or legislative department recognizes one of the contending parties as the rightful possessor of the territory in dispute, the courts must accord similar recognition to that nation. To quote from the leading case:

"To what sovereignty any island or country belongs, is a question which often arises before courts in the exercise of maritime jurisdiction; . . . And can there be any doubt, that when the executive branch of the government, which is charged with our foreign relations, shall in its correspondence with a foreign nation assume a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department?"

A similar position was taken by the court in a case which involved the question of the location of a banana plantation, the two nations involved being Costa Rica and Panama. A part of the District of Columbia was retroceded by the national government to Virginia, and the court refused to pass upon the validity of the retrocession of the territory, holding Virginia to be the sovereign of the territory.

It seems as though it makes a difference whether it is the state department or the department of justice which is putting forward the claim of jurisdiction, for there have been cases in which the latter department has been contending in a suit before the court that a given territory was within the jurisdiction of the United States where the court has refused to accede to that view. But where the courts are empowered by statute to settle claims involving territory and boundary they may proceed

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65 The James G. Swan, (1892) 50 Fed. 108; The Kodaiak, (1892) 53 Fed. 126, both dealing with Alaskan fishing off the coast at a distance of ten miles or more.
66 La Ninfa, (1896) 75 Fed. 513.
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to do so and when the United States appears as a suitor in the courts the ordinary rules which prevail in actions between private individuals will govern. Congress can divest a political question of its character by providing that it be settled by the courts. In one such case the court admitted documents in evidence, though those documents were not recognized by the executive department. In Cordova v. Grant the government suggested that the court try only cases of squatters, and not cases involving Mexican land titles, there being a dispute at the time between the United States and Mexico over the land involved. The court, acting upon this suggestion from the government, proceeded to try only squatters' titles. Sometimes it seems as though the courts verge close upon the decision of questions of territorial sovereignty, but when closely examined it will be found generally that other explanations of the cases of this appearance are available. So when the court construes a statute or proclamation it must be borne in mind that it is the attitude of the political department which is being sought through the medium of interpretation. A case concerning the status of the Isle of Pines is to be explained on this ground. The court in that case intimates that the status of the island was to be determined as a matter of fact, but recourse was had to the acts of the political departments in this case also. It seems, therefore, that the courts will follow the political departments in their assertion of jurisdiction over territory whether on land or on sea, as well as in disputes between foreign nations over a territory, except in such cases as the political departments may authorize the court to settle as a matter of law.

\[71\] United States v. Arredondo, (1832) 6 Pet. (U.S.) 691, 8 L. Ed. 402.
\[72\] In Tartar Chemical Co. v. United States, (1902) 116 Fed. 726, the court settled the question of the status of Algiers according to the principles of the French law, the court having jurisdiction under the act giving jurisdiction in cases involving customs appeals.
\[76\] It is probably not necessary to call attention to the fact that the Supreme Court of the United States is empowered to settle disputes over boundaries arising between states. See Rhode Island v. Mass., (1838) 12 Pet. 657, 9 L. Ed. 1233.
5. Recognition of States, Governments, War and Measures Short of War

The recognition of a state is a function entrusted to the executive department. It was argued in the early case of *Rose v. Himely*\(^ {77} \) that the court should regard Santo Domingo as an independent state for the reason that not only had that island declared its independence but it had succeeded in maintaining that independence for a considerable period of time. The court refused to accede to this view, Chief Justice Marshall stating that the court must consider the island under French dominion until the government of the United States should recognize the independence of the revolting colony. A plea which did not aver that Petion and Christophe were foreign states which “had been duly recognized as such by the government of the United States” was held bad in *Gelston v. Hoyt*.\(^ {78} \)

“A republic of whose existence we know nothing” was the characterization of the Republic of Mexico by Chief Justice Marshall in *United States v. Klintock*,\(^ {79} \) which involved the validity of a commission purported to be issued by authority of that state. The court was asked in *Kennett v. Chambers*\(^ {80} \) to say whether Texas was a sovereign state previous to its annexation to the United States. The department of government charged with the control of foreign relations was said in that case to be the proper one to settle the status of Texas.

In one case Justice Johnson on circuit expressed the opinion that in the absence of any affirmative recognition of independence

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\(^ {77} \)(1808) 4 Cranch (U.S.) 241, 2 L. Ed. 608. In Clark v. United States, (1811) 3 Wash. (U.S.C.C.) 101, Fed. Cas. No. 2,838, a question was made whether an act of Congress of March 1, 1809, forbidding imports to the United States from England or France or any of the colonies of either, applied to imports from Santo Domingo. It was contended by counsel for the government that by the law of nations the court could not pass upon the question. The court held that Congress did not intend to include imports from Santo Domingo, but on the contrary, had given evidence of its opinion that France still retained the sovereignty over the island.

\(^ {78} \)(1818) 3 Wheat. (U.S.) 246, 4 L. Ed. 381. In United States v. Hutchings, (1817) 2 Wheeler Cr. Cas. 543, Fed. Cas. No. 15,429, Chief Justice Marshall sitting on circuit, said, speaking of the Spanish colony of Buenos Ayres: “That before it could be considered independent by the judiciary of foreign nations, it was necessary that its independence should be recognized by the executive authority of those nations.”

\(^ {79} \)(1820) 5 Wheat. (U.S.) 144, 5 L. Ed. 55.

\(^ {80} \)(1852) 14 How. (U.S.) 38, 14 L. Ed. 316. The same rule was applied during the Civil War with regard to the Confederate states. In response to a question by a juror, Justice Nelson stated in one case that the court could not pass upon the de facto independence of the Confederate states in 1861. *United States v. Baker*, (1861) 5 Blatch. (U.S.C.C.) 6, Fed. Cas. No. 14,501.
by the government "courts exercising jurisdiction of international law may often be called to deduce the fact of national independence from history, evidence, or public notoriety . . ." 81 This decision was, however, negatived by the Supreme Court on an appeal. 82

Not only is the recognition of a state a political question but the recognition of the government of a state also is to be placed in that class. 83 When the executive has not recognized the government of a state the courts are not at liberty to treat that government as having any legal existence so far as they are concerned. 84 On the other hand, if the executive has recognized a government as the government of a given state, the courts are bound to consider that government as the legal government in the state. This sometimes leads to curious results. In 1917 two cases were decided in the Supreme Court in which the court followed the executive department in their recognition of the Carranza government in Mexico. 85 That government soon fell from power. The succeeding government was not recognized by the state department for several years. Nevertheless, in 1923, shortly before such recognition had been extended, a New York court held itself powerless to give any force and effect to a decree of a Mexican court because the government had not been recognized. 86

In connection with the changes in government which took place in Russia during the World War a number of cases have been raised in the courts of the United States wherein it was sought to have the courts determine whether the Soviet Republic was the legal government of Russia so far as the United States was concerned. In 1918 it was decided that evidence tending to show "who and what the present government of Russia is" was inadmissible, because the state department had recognized the Kerensky government. 87 That government was of very short

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81 Consul of Spain v. The Conception, (1819) 2 Wheeler Cr. Cas. 597, Fed. Cas. No. 3,137. This portion of the opinion was dictum.
82 (1821) Wheat. (U.S.) 235, 5 L. Ed. 249.
83 The Nereide, (1815) 9 Cranch (U.S.) 388, 3 L. Ed. 769; The Estrella, (1819) 4 Wheat. 298, 4 L. Ed. 574; The Nueva Anna and Liebre, (1821) 6 Wheat. (U.S.) 193, 5 L. Ed. 239.
84 See this general topic the article by E. D. Dickinson, The Unrecognized State or Government in English and American Law, 22 Mich. L. Rev. 29.
duration. The Soviet Republic was established and constituted the de facto government of Russia for a period extending to the present time. In spite of the patent and notorious fact that the Soviet Republic is the government of Russia today, and has been well established for several years the courts have held as late as the month of October, 1923, that the government of Russia is in legal contemplation of the courts of the United States that government which was recognized in 1918.88

The recognition of the diplomatic character of persons claiming to represent the government of a state is also a political question. This rule applies to diplomats and consuls.89

The recognition of belligerency is likewise a political question.90 This is true in cases of domestic uprising as well as in cases involving foreign nations, for several cases arose during and after the Civil War which turned on that question, and it was said in them that the courts must follow the action of the president in his recognition of the Southern states as belligerents.91 The same doctrine applies also to a state of insurgency.92

Whether the United States wishes to enforce a policy of neutrality towards belligerents is not for the courts to determine. If the executive and legislative departments of the government permit shipments of arms to be made to a belligerent, it is not for the courts to halt the shipments. Attempts to procure injunctions against such shipments have failed.93

92United States v. The Three Friends, (1897) 166 U. S. 1, 41 L. Ed. 897, 17 S.C.R. 495.
93See Pearson v. Parsons, (1901) 47 C.C.A. 185, 108 Fed. 46, for an attempt to halt arms shipments to South Africa during the Boer War.
6. STATUS OF INDIAN TRIBES

The Indian has occupied an anomalous position in the constitutional system of the United States. The tribal Indian is not a foreigner, nor is he a domestic citizen. He is a member of a dependent domestic nation. Whatever may be the difficulty in explaining the position of the Indian in this country, it is now well settled that the national government has practically complete control over his destinies so long as he is in the tribal state. The tribal state is not to be determined by the court from an examination of the evidence as to the stage of civilization in which a given group may be living. It is the political departments who determine whether a group of Indians constitute a tribe, and the court applies their findings as a rule of decision without entering into the merits of the case.

The control over tribal Indians has been derived from a number of sources. Congress is given power to regulate commerce with the Indians. But this power is limited by the fact that the constitutional grant extends only to Indians in the tribal relation. Nevertheless, this grant of power has been construed in a very broad manner. The treaty making power was used in several hundred instances prior to 1871 by the national government in its dealings with the Indian tribes. These treaties were negotiated by the president and ratified by the Senate, and to all intents and purposes were on a par with those treaties concluded with foreign nations. A third source of power is

Also a Wisconsin circuit court case reprinted in 11 Am. J. Int. L. 883, similar attempt as to shipments to Allies during World War.

95 United States v. Kagama, (1886) 118 U.S. 375, 30 L. Ed. 228, 6 S.C.R. 1109.
96 United States Constitution, art. 1, sec. 8, cl. 3.
98 Thayer, op. cit., 109. This method of dealing with the Indians was discontinued in 1871 when a rider was appended to an appropriation bill taking this power from the hands of the president and placing it under the control of congress. This was a doubtful constitutionality. See Hall, op. cit., 324. Indian treaties are construed less strictly than treaties with foreign nations, the situation of the Indian as a ward being taken into consideration. Thus, technical terms are often given a more general meaning. See 2 Butler, The Treaty Making Power, 203-215; Jones v. Meehan, (1899) 175 U.S. 1, 44 L. Ed. 49, 20 S.C.R. 1.
99 22 Cyc. 121. The qualification of interpretation set forth in the preceding note should be mentioned in this connection.
that which is found in the control which Congress possesses over territories.\textsuperscript{100} That was important at one time, but is of little significance at the present time so far as Indians in the continental portion of the United States are concerned. It has been said by the Supreme Court that it is the duty of the national government to aid and protect the Indians, and that because of this duty to them Congress must have the power to legislate concerning Indian affairs.\textsuperscript{101} While this may be a rather irregular doctrine when viewed from the standpoint of constitutional law, the language which has been used by the court at times would seem to warrant the belief that legislation relating to Indians would be upheld on this ground if other sources failed.

In the famous case of \textit{Cherokee Nation v. Georgia}\textsuperscript{102} all the justices agreed that the status of an Indian tribe was a matter for the political department to determine. The divergence of opinion in that case came in attempting to determine whether the national government had recognized the Indians as a nation. It resolved itself into a matter of interpretation. The majority of the court thought that the government had recognized the Cherokee Nation as a domestic nation, not as a foreign nation, at least not a foreign nation within the meaning of the judiciary article. The dissenting justices were of the opinion that the tribes had been recognized as a foreign nation capable of maintaining suit in the Supreme Court.

In \textit{United States v. Holliday}\textsuperscript{103} the question was made whether a certain group of Indians constituted a tribe, and the court decided that it would follow the executive and legislative branches in their recognition of the group in question as a tribe. The commissioner of Indian affairs had recognized the Indians as a tribe in this case, and the court followed that action. An attempt by the state of Kansas to tax certain lands belonging to the Shawnee Indians was resisted on the ground that the Indians in question constituted a tribe under the control of the national government. Justice Davis of the Supreme Court said,\textsuperscript{104}

\textsuperscript{100}United States constitution, art. 4, sec. 3, p. 2. Canfield is the only writer examined who has called attention to this source of power. See 15 Am. L. Rev. 24. The note in 21 L.R.A. 173 stating that most of the cases have come up under the power of Congress to govern territories is in error.

\textsuperscript{101}United States v. Kagama, (1886) 118 U.S. 375, 30 L. Ed. 228, 6 S.C.R. 1109.

\textsuperscript{102}(1831) 5 Pet. (U.S.) 1, 8 L. Ed. 25. The historical background of this case is set forth in Beveridge, John Marshall, p. 539 ff; 5 McMaster, History of the United States, p. 175 ff; 2 Warren, The Supreme Court in United States History, chap. 19.

\textsuperscript{103}(1865) 3 Wall. (U.S.) 407, 18 L. Ed. 182.
"If the tribal organization of the Shawnee is preserved intact, and recognized by the political department of the government as existing, then they are a 'people distinct from others,' capable of making treaties, separated from the jurisdiction of Kansas, and to be governed exclusively by the government of the Union."

The action of the political department was held to settle "beyond controversy that the Shawnees are as yet a distinct people, with a perfect tribal organization."

The regulation of the liquor traffic with the Indians has given rise to considerable litigation. The traffic to be regulated was generally with reservation Indians. It is well settled that Congress may regulate this commerce. It was observed in one case which involved a certain Wascoe Indian that the power to sever relations with a tribe did not reside in the individual Indian. The court ruled that "The recognition or dissolution of the tribal relation is a matter in which the courts usually follow the action of the political departments of the government."

The courts have refused to decide for themselves whether a band of Indians have become citizens of the United States. Guidance will be sought in such cases in acts of Congress particularly, and sometimes in treaties concluded with the Indians. The court has looked to congressional acts and treaties to ascertain whether a half-breed belongs to the side of the white father or the Indian mother. The fact that the lands of the tribe have been allotted in severalty does not relieve the courts of the duty to abide by the decision of the political departments in these cases. It was stated in one case where this was true, that: 

"Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government."

104 The Kansas Indians, (1866) 5 Wall. (U.S.) 737, 18 L. Ed. 667; also the N.Y. Indians v. United States, (1898) 170 U.S. 1, 32, 42 L. Ed. 927, 18 S.C.R. 531.
105 United States v. Earl, (1883) 17 Fed. 75, 77. See also United States v. Boyd, (1895) 68 Fed. 577, where it was said: "In determining the attitude of the government towards the Indians, all Indians, the courts follow the action of the executive and other political departments of the government, whose more especial duty it is to determine such affairs." See also Holden v. Joy, (1872) 17 Wall. (U.S.) 211, 21 L. Ed. 523.
106 Me-Shing-go-me-sia v. State, (1871) 36 Ind. 310, 316.
The doctrine of the above cases has been followed by the courts with the possible exception of one case wherein the status of Indian tribes has been involved.

Justice Van Devanter suggested a limitation on the scope of this rule, however, when he said in United States v. Sandoval:

"Of course, it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe."

This dictum calls attention to the limits of the power which may be exercised under the authority of the control over Indians which is given to congress.

7. GUARANTY OF REPUBLICAN GOVERNMENT

The states of the United States are guaranteed a republican form of government by the fourth article of the federal constitution, section four of which reads:

"The United States shall guarantee to every state in this Union a republican form of government, and shall protect each of them against invasion; and on the application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence."

It will be noted that there are three guaranties contained in this section, namely of protection against invasion, domestic violence, and of a republican form of government. Congress has provided by statute for the enforcement of the first two guaranties, but has not seen fit to include the third guaranty in the statute.

In Luther v. Borden, a case involving the enforcement of the guaranty of protection in case of domestic violence, which enforcement had been entrusted to the president by statute, the court, speaking through Chief Justice Taney laid down the rule

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113 An Act to Provide for Calling Forth the Militia to Execute the Laws of the Union. Annals of 3rd Congress, 1793-95, p. 1508. On congressional power in this regard, see 2 Tucker, op. cit., p. 637.
114 (1849) 7 How. (U.S.) 1, 12 L. Ed. 581. In connection with this case see McMaster, History of the People of the United States, pp. 163-78 and authorities there cited; 2 Warren, op. cit., 459; Willoughby, op. cit., 156-61.
that the enforcement of the guaranty of republican government was retained by Congress, and that the question of its enforcement was a political matter over which the courts would not take jurisdiction. The decision in Luther v. Borden did not rest upon this ground, but rather upon the ground that the president had been selected by Congress to carry out the guaranty of protection in case of domestic violence. Because the dictum of Chief Justice Taney has exerted such an important influence in all subsequent cases arising under this clause of the constitution, his statement will be quoted in full. He said:115

"Under this article of the constitution it rests with Congress to decide what government is the established one in a state. For as the United States guarantee to each state a republican government, Congress must necessarily decide what government is established in the state before it can determine whether it is republican or not. And when the senators and representatives of a state are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal. It is true that the contest in this case did not last long enough to bring the matter to this issue; and as no senators or representatives were elected under the authority of the government of which Mr. Dorr was the head, Congress was not called upon to decide the controversy. Yet the right to decide was placed there, and not in the courts."

It will be seen from the last two sentences of the quotation from the opinion of the chief justice that the opinion on this point was dictum, but few would be willing to disagree with the soundness of the view expressed by him in the quotation set out. For it is reasonable to believe that Congress wished to retain the power to pass upon the republican character of state governments, it having given the enforcement of the other two guaranties to the executive, but saying nothing as to the guaranty of republican government.

Texas v. White116 was the next important case involving this provision of the constitution. During the reconstruction period it was sought to justify the policy of the radicals in

115(1849) 7 How. (U.S.) 1, 43, 12 L. Ed. 581. See Martin v. Mott, (1827) 12 Wheat. (U.S.) 19, 6 L. Ed. 537 on other portions of the statute of 1795.

116(1868) 7 Wall. (U.S.) 700, 727, 19 L. Ed. 227. See 3 Warren, op. cit., 210; Flierson, Texas v. White, in 18 and 19 S.W. Hist. Quart., a long article printed in several issues, covering the historical background of the case in detail.
Congress by deriving from this clause of the constitution power to set up governments in the Southern states. The only trouble with this was that the governments set up could by no stretch of the imagination be called republican. They were military governments and so designated by the very acts which established them. During the course of the reconstruction period Texas came before the Supreme Court and asked to be admitted to the court for purposes of suit. The court decided that Texas was a state of the Union, and also decided that she could sue in the Supreme Court. Texas did not have a republican government at this time, and Congress had expressly stated several times that Texas did not have such a government. That body refused to recognize the government of Texas until 1870, when judged by the rule enunciated by Chief Justice Taney in Luther v. Borden.

The upshot of the decision in Texas v. White is merely this, that a state does not need to have a republican government in order to maintain suit in the Supreme Court. Any other view of the case fails to dispose of the conflict between the avowed intention of the court to follow the lead of Congress in the matter, and the fact that the court would have to disregard that body's attitude if Texas were admitted to maintain suit.

In Luther v. Borden and Texas v. White forcible attempts at changing state governments were under consideration. In more recent times less vigorous methods of altering the character of state governments have been challenged as violating the form of government guaranteed to the states. Reference here is had to the initiative and referendum features embodied in numerous state constitutions. These provisions were attacked on this ground, but the court held that whether such provisions in a state constitution, and laws enacted under such constitutional provisions rendered the government of a state un-republican in form, was a question for Congress to decide. Thus it is hardly

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118 In support of the view that Congress did not admit that the government of Texas was republican the following is submitted. None of the state governments formed under Lincoln's proclamation of Dec. 8, 1863, were admitted by Congress. See Bassett, Short History of the United States, 597. The Twenty Second Joint Rule and the resolution that the electoral votes of the states restored under Lincoln be not counted, are mentioned in Bassett, p. 598. See further, the act of July 19, the act of March 2, and the resolution of July 20, 1868, excluding the electoral votes of Texas. For these see McDonald, Documentary Source Book, pp. 514, 500, 535. The first compliance with the rule laid down in Luther v. Borden was in 1870 when the representatives from Texas were admitted to Congress. Bassett, op. cit., 625.
correct to say that the court upheld the initiative and referendum provisions on this score, but rather that they refused to pass upon their merits.

It has been held that whether Congress coerced a state into accepting its constitution was a political question. But there were expressed in some of the opinions sustaining this view some qualifications, and in Coyle v. Smith, the court held that the imposition of conditions upon a state as the price of admission to the union which substantially affected that political equality of all the states which is implied in the federal system of government, could not be sustained under the guise of guaranteeing a republican form of government to that state. There are limitations on the scope of the things which can be accomplished under the guaranty clause.

Whether a state constitution or amendments to the same have been adopted in a proper manner will not be settled by the federal courts. The authorizing of a railroad to be built outside and beyond the county line, to be paid for in part by the freeholders of the county, the levy of school taxes without popular vote, and the changing of municipal boundaries have been held to be political questions. The federal courts have also refused to hold that irregularity in election proceedings and registration of voters in the states have rendered the states in question unrepresentative as to the form of their government.

In a comparatively recent case the court refused to decide which of the two claimants to the governorship of Kentucky was to be deemed

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the rightful contender. In a criminal case it was asserted by counsel that an irregularity in the adoption of the criminal code of the state of Texas rendered the government of that state unrepublican, but the court refused to pass upon the question.

The courts have, however, in occasional dicta enumerated various characteristics and factors by which to judge a republican government. For example, it was said in United States v. Cruikshank that the equality of citizens was a characteristic of that republican government which flourishes in this country. The judicial department has been mentioned as an essential element in a republican government, while on the other hand it is apparently not necessary that women should be enfranchised in a republican government. It was queried in South Carolina v. United States whether the fact that a state entered into the public utility business would render the government of the state unrepublican, a suggestion severely criticized by one commentator. These suggestions are interesting, but that is the extent of their importance.

It is clear that the enforcement of the guaranty of republican government is a political question which the courts will not attempt to settle. If Congress recognizes a state government as being of that character the courts will also regard it in the same light. It appears, however, that there are limitations upon the exercise of the power conferred in this clause upon Congress, for according to several dicta and Coyle v. Smith, Congress may not impose unconstitutional restrictions upon the states under the guise of maintaining a republican form of government.

Conclusions

These then are general subjects which the courts have held to be political in their nature. There doubtless are others which have been overlooked in the search made for cases on this topic by the writer. A study of the cases brings out the fact that there are several views regarding the exact character of a political

129(1875) 92 U.S. 542, 555, 23 L. Ed. 588.
131Minor v. Happersett, (1874) 21 Wall. (U.S.) 162, 175, 22 L. Ed. 627.
133Willoughby, op. cit., 153.
134Griffin Case, (1869) Fed. Cas. No. 5,815.
question. But by far the greater number of cases treat a political question as one which is committed to either the legislature or the executive for final determination. It seems to result from the separation of powers between the three departments of government. Another view of political questions which occasionally finds expression in the cases is that they are beyond the control of the courts because their settlement rests with the electorate. This view regards these questions as political because they are involved in politics in the general meaning of that term. Instances of this view are to be found in the dissenting opinion of Justice Woodbury in Luther v. Borden, and the opinion of Chief Justice Fuller in Taylor v. Beckham.

It is difficult to state with satisfactory clarity the distinctive functions of the three departments of government as they operate in the national government of the United States. The legislature is often designated as the rule making body, the executive as the rule enforcing body, and the courts as the rule applying body. The legislature is said to prescribe the laws which the courts are to apply. The judicial department is characterized by deliberative consideration of controverted facts with the purpose of applying the law to them which has been prescribed by the legislative department. Whatever may be the difficulties in definitively describing the differences between the judicial and the legislative department it seems settled and clear that the court must have some rule to follow before it can operate. Where no rules exist the court is powerless to act. From this it follows that the courts cannot enter into questions of statecraft or policy. Especially is this true when the decisions which they might make would perhaps not be heeded by the other departments of the government because of the strong political considerations involved. The conduct of foreign relations is of necessity characterized by considerations of policy rather than by a regard for the application of minute rules of law. The judiciary of nations have not as yet reached the point where they apply the rules of international law as limitations upon the departments of government which control the international relations of their nation. Until that time comes, most of the questions arising out of foreign affairs cannot be settled in the domestic courts.

While this is especially clear with regard to the conduct of foreign relations, it is almost equally applicable to the other subjects which have been held to be political questions. There are

125 (1849) 7 How. (U.S.) 1, 51 ff., 12 L. Ed. 581.
not any rules of law nor principles of law readily applicable to the conduct of Indian affairs. The nature of the question is such that the law making department has not seen fit to commit it to the cut and dried methods of the courts. Questions of policy are too paramount to admit of the application of definite legal principles, and no legal principles have been developed which are applicable.

It is true that the courts have not formulated any very clear conception of the doctrine of political questions, nor have they always acted upon the same general principles. But a reading of the cases seems to warrant the statement that the most important factor in the formulation of the doctrine is that stated above, namely, a lack of legal principles to apply to the questions presented. There can be no doubt but that the court has occasionally dodged the responsibility attendant upon the decision of some cases by calling them political. These cases are few in number, and any view which attempts to dispose of the subject of political questions in that manner is superficial. A more important factor in the cases than this last mentioned factor has been a desire on the part of the courts not to apply too strictly the doctrine of constitutional limitations to the exercise of certain powers which have seemed necessary to the effective conduct of the business of government, but which has not been granted to the national government by the constitution. This factor is evident in the cases on foreign relations, as well as those concerning the Indians. If one reasons from the federal character of the United States he is likely to be impressed at first thought with the apparent lack of harmony between the doctrine of constitutional construction which views the national government as one of delegated powers, and the exercise of a large number of powers by the national government in matters of international concern, which are not expressly nor even in many cases impliedly granted to that government. The difficulty disappears to a large extent when it is remembered that the federal character of the government is restricted to municipal affairs, and that for purposes of international relations the government of the

137 This will appear when one considers that the court decides many cases which are fraught with just such possibilities and consequences as would tempt the court to dodge the case. No better example could be found than the recent decision of the child labor case, Bailey v. Drexel Furniture Co., (1922) 259 U.S. 20, 42 S.C.R. 449, 66 L. Ed. 817. Many other cases along this line could be cited. Any number of the cases which are actually decided are more "dangerous" than those which are alleged to be sidestepped.
United States is unitary. The national government may exercise the powers of sovereignty at international law. There would, therefore, be no need under this view to resort to the doctrine of political questions in order to allow the exercise of these powers by the national government.

Constitutional limitations are not thrown overboard by the theory of political questions. To argue that this theory should be extended so as to enable the national legislature to embark upon any program of social legislation which it should deem proper is totally to misunderstand the underlying principles of the cases. A study of the cases will show that those questions which are called political that do not relate to foreign relations are repeatedly treated by the courts as subject to constitutional limitations. This is clear in the cases concerning Indian affairs and the guaranty clause of the constitution. For these reasons it is believed that the true basis of a political question is the lack of legal principles for the courts to apply in their consideration of cases involving certain types of subject matter, and the commitment of their final disposition to the political branches of the government. Perhaps the explanation of the doctrine of political questions is to be sought as much in history as in logic, but there is also some basis for it in logic.

Footnote: For an example of this type of argument see the article by Maurice Finkelstein, Judicial Self-Limitation, 37 Harv. L. Rev. 338.